BRIEF FOR RESPONDENT.

I.

Reviewing Sufficiency of Evidence.

"It is the plain duty of a reviewing court, after a verdict for plaintiff, to assume the most favorable statement of plaintiff's case to be true * * *." The fact that a jury might "have drawn a different conclusion from his evidence or have disbelieved it in essential points" makes no difference.

Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 469;
Op. in Pashea v. Terminal Railroad Assn. (R. 172 et seq. and R. 230, 231) and cases cited;
Hardin v. I. C. R. R. Co., 334 Mo. 1169, 1182, and cases cited, U. S. Sup. Ct. Decs. Reviewed (certiorari denied, 293 U. S. 574);
Phoenix Ins. Co. v. Dosten, 109 U. S., l. c. 32;
Delk v. St. L. & S. F. R. R. Co., 220 U. S., l. c. 587;
Gunning v. Cooley, 281 U. S. 90, 93, 94, 95.

II.

Petitioner's Claim as to a "Federal" Rule.

Petitioner insists that there is some rule "in the federal courts" which entitled it to a directed verdict on the ground that its evidence (in its opinion) is stronger than that of respondent.

There is no such rule. The usual rule (Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 469) applies.

The matter is well treated in the Missouri Supreme Court's opinion in this case (R. 172, l. c. 179), and a great many decisions of this Court are cited therein.

Hardin v. I. C. R. R., 334 Mo. 1169, 1182 (certiorari denied, 293 U. S. 574) (U. S. Sup. Ct. Decs. Reviewed);

Parrent v. M. & O. Rd. Co., 334 Mo. 1202, 1210, 1211, 1212;
Pashea v. Terminal R. R. Assn. (R. 179).

III.

"Physical Law."

1.

It is a settled rule that "It requires an extraordinary case to authorize a court to regard sworn testimony as manifestly impossible and untrue * * * so frequently do unlooked for results attend the meeting of interacting forces that courts should not indulge in arbitrary deductions from physical law except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other."

20 Am. Jur., Sec. 1183, p. 1134, and cases cited;
Schupback v. Meshersky, 300 S. W. 465, 467;
Parrent v. M. & O. R. R. Co., 334 Mo. 1202, 1213;
Gately v. St. L. & S. F. Ry. Co., 332 Mo. 1, 14;
Murphy v. Wolferman, Inc., 148 S. W. (2d) 481, 485;
Opinion in this Pashea case, 165 S. W. (2d) 691, 694, R. 172 et seq. and R. pp. 230, 231.

2.

Another statement of the rule is that physical facts may be considered, if relevant, but "proof of such a nature cannot be construed to establish a particular conclusion, as a matter of law, **unless all the facts lead to but one conclusion to the exclusion of all others.**"

32 C. J. S., Sec. 1031, pp. 1074, 1075.

3.

When it is claimed on the trial (as it was in this case [R. 155 et seq.]), that plaintiff's evidence is utterly incredible and physically impossible, "it is as easy to demonstrate the truth before the jury as it is before the court."

Walters v. Syracuse R. T. Co., 178 N. Y. 50, 53.

IV.

1.

Evidence Not in Record Here.

(1) Certain "indications" and "demonstrations" (R. 65, 66, 67, 68, 69, 70, 71, 86) were indulged in by petitioner's counsel at the trial, aided by respondent, which showed precisely and in detail what happened to respondent when the stop was made—and how it happened. The record **here** does not show these things. The trial court and jury saw all of them. This Court has no chance to see any of them. **The trial jury and trial court both found against petitioner's claim of "impossibility" and "incredibility" and conflict with the "law of inertia."**

(2) This Court is now asked ultimately to reverse a judgment of a state court, based upon a jury verdict, approved by the trial court, and to do that by holding that there is and was no substantial evidence, and that on a record which demonstrates that **vital matters on the exact point (indications and demonstrations before the jury) are not brought here for its consideration** (R. 174, Op. of Missouri Ct. in this case) (Respondent's statement of facts, supra).

2.

"Indications" and Demonstrations at Trial Vital.

(1) On a claim of conflict with physical law, "all the necessary data for demonstration must **affirmatively** appear." The absence of the "indications" and "demonstrations" shown on the trial is highly important.

Winkler v. P & M Mining Co., 141 Wis. 244, 247.

(2) In every case where any doubt can arise, the Court's duty is to remit the question to the jury.

Walters v. Syracuse R. T. Co., 178 N. Y. 50, 53.

V.

1.

The Instinct of Self-Preservation.

The jury, from common knowledge, was authorized, and it was its duty, to interpret the evidence in the light of the instinct of self-preservation.

As to that matter this Court has held:

> "**The presumption is founded on a law of nature.** We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to its exercise in the fear of pain, maiming and death. There are few presumptions based on human experience that have surer foundation than that expressed in the instruction objected to."
>
> B. & O. R. R. Co., 191 U. S. 461, 474.

2.

Common Knowledge "Part of Jury System."

A jury has the right and duty, in their deliberations, to use their "common knowledge" and experience and "relations among men," their "common sense," their knowledge of the "natural" and "universal" instincts of men. Jurors are not required to lay these aside, nor are they able to do so. These things are a part of every juryman. **"It is a part of the jury system."**

Dunlop v. United States, 163 U. S. 486, 487 (10), 499, 500;
B. & O. v. Landrigan, 191 U. S. 461, 474, at top;
Rostad v. Portland Ry. Co., 101 Ore. 569, 578, 581;
Jenney Elec. Co. v. Branham, 145 Ind. 314, 37 L. R. A. (N. S.) 790, 793.

VI.

1.

Affirmative Evidence Not Essential.

There can be no objection to the fact that some material or essential element in a case, or a defense, is not proved by definite affirmative testimony, "but is found by the jury's verdict by" processes of reasoning from the evidence.

Van Brock v. Bank, 161 S. W. (2d) 258, 260, 261 (the quotation from **Thayer** in this opinion is pertinent).

2.

Jurors' Common Sense Part of Jury System.

Jurors are not to "abdicate their common sense or adopt any different processes of reasoning" from those they use in their affairs of consequence. "Their sound common sense * * * is the most valuable feature of the jury system" and it is that which "preserves its popularity."

Dunlop v. United States, 165 U. S. 486, 487 (10), 499, 500.

VII.

1.

The Natural Reactions of a Living Being to Be Considered.

The reactions of a living being cannot "be accounted for by every rule which might find application to an inanimate body."

Hoyt v. Met. St. R. Co., 73 App. Div. 249, 251, affirmed 175 N. Y. 502.

2.

Sudden Emergencies.

"Persons in sudden emergencies, and called upon to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases" and one who asserts he has been injured by another's negligence is entitled to have his own actions judged with "regard * * * always * * * to the exigencies of his position, indeed, to all the circumstances of the particular occasion."

U. P. Ry. Co. v. McDonald, 152 U. S. 262, 281, and cases cited.

3.

Memory of Details Not to Be Expected.

In a case involving a claim of conflict with physical law, it is the rule that one suddenly subjected to grave peril cannot be held to an exact memory and reproduction of everything that happened and that he did to extricate himself.

Pettyjohn v. I. H. & P. Co., 161 S. W. (2d) 248, 251 (Mo. Sup. Ct.);
Pashea v. Terminal R. R. Assn., 165 S. W. (2d) 691 (this case).

ARGUMENT.

I.

Petitioner's Points.

In its statement of "Reasons Relied Upon for the Allowance of the Writ" (Petition, pp. 10-15, inclusive), petitioner states the grounds upon which it relies in this Court. There are four:

1. That respondent's testimony is incredible and impossible of belief; 2. that respondent's evidence is so "self-contradictory as to destroy its probative value"; 3. that petitioner's evidence "is so destructive of respondent's evidence that this judgment cannot stand"; 4. that the opinions of the court below affirming respondent's judgment are based upon speculation and are directly contrary to respondent's evidence.

II.

Inadequacy of Petitioner's Statement.

In connection with the statement of the foregoing "Points," petitioner introduces (Petition, 11-13) certain brief references to the evidence in connection with each. The inadequacy of these is shown by our comment on petitioner's statement of facts and by "Respondent's Statement of the Facts" (both of which are found supra under section IV of this Brief, p. 3), and, also, appears from the statement of the facts as set forth by the Missouri Supreme Court in its opinion (R. pp. 172-180, inclusive, and, on rehearing, R. pp. 230, 231).

Petitioner slightly elaborates its statement of facts in its "Argument," but achieves no appreciable advance toward adequacy. It is requisite that all the facts be before this Court in this proceeding. Nothing less can suffice for a determination of the questions petitioner brings forward. Petitioner's "Reasons" do not add or prove anything.

III.

Petitioner's Assumptions.

At pages 22-35 of its brief in this court, petitioner discusses the "law of inertia."

1.

Petitioner, in that discussion, makes some unwarranted assumptions:

Throughout its argument it, by the most necessary implication, assumes that a living and active human being is affected, in all instances and particulars, by "the law of inertia" exactly as an inanimate object would be affected by it. (See Hoyt v. Met. St. R. Co., 73 App. Div. 249, 251, affirmed 75 N. Y. 502.)

This assumption is unjustified and is further unwarranted because itself opposed to the fundamental instinct of self-preservation and to common knowledge. Every man and juror knows the struggle that is initiated instantly when serious peril suddenly menaces a man. It is common knowledge that he exerts immediately the utmost efforts of which he is capable in order to save himself. Cases cited supra from this Court establish this doctrine.

2.

Petitioner assumes that every man assailed by imminent peril, which he instinctively and instantly fights with all his strength and vigor, and who, nevertheless, is cruelly and disablingly hurt, must be held by this Court to remember at his peril every detail of the cause of his injury and his struggles to avert peril and then be able to detail them all with a perfection of diction which will satisfy cross-examining counsel in an action for redress. That is not the law (Pettyjohn v. I. H. & P. Co., and the Missouri Supreme Court's opinion in this case. Both cited supra).

3.

Petitioner's assumed meaning of "knock" is not justified. Petitioner ascribes to the word "knock" a too strict and rigid meaning. Its argument depends upon an acceptance by this Court of that rigid meaning as a thing established as a matter of law. The fact is that, at the trial, respondent, his counsel, and petitioner's counsel, himself, all used other words to describe the manner of respondent's precipitation from the car (R. pp. 57, 61, 64, 71, 83, 86, 88, and others). Respondent testified he was "knocked" from the car, was "thrown" from the car and "fell" from the car, "went down" from the car. Each meant, to him, the same thing, i. e., that the cause of his **descent** from the car was the negligently violent stop and the train of things it bred. They also meant the same to petitioner's counsel at the trial.

4.

Absence of Evidence From Record.

Petitioner assumes that all the facts developed before the jury were in the record in the Supreme Court of Missouri and are in the record here. Neither is the case. The record here shows that petitioner's counsel, at the trial, with the collaboration of respondent, respecting the very matter of the precise position, stance, preparation for a ((careful) stop, in case one was to be made at this "regular" stopping place, produced a "writing board" and "clip," and numerous things were discussed and **demonstrated before the jury** (R. pp. 69, 70, 71, 86). Not any of these indications and demonstrations are before this Court. Nor can what they said and did be understood without them.

5.

Petitioner (Petitioner's Brief, p. 24) argues that the train was not "in a curve" (when both sides proved it was) and then assumes that it "makes no difference if it was." Benson (petitioner's brakeman) testified the train was in a "rather steep curve" when respondent was hurt (R. 109), and respondent testified likewise (R. 61, 66, 47). It was about a rear car on a train "in a curve" that respondent was testifying when he said the rear car "jerked and swung around and wrastled around" (R. 61). (See R. 130, 140.) Here petitioner has, by implication, offered "physical law" of its own for this Court's consideration.

IV.

The Matter of "Bracing Himself."

Petitioner (p. 24 et seq. of its "Petition and Brief") argues the matter of the "law of inertia."

1. It begins (p. 24) by attempting to rid itself of respondent's testimony concerning his "bracing himself." It complains that respondent "does not say what he means by that" and argues that he must have meant that he "braced himself" **after the stop was made.** Respondent's testimony requires no such translation (R. pp. 60, 61). The train was approaching a point where it usually made a "regular stop," St. Clair avenue. Sometimes "they pull the whole train in" (R. p. 78). Respondent was "bracing" himself against a stop, if one were made (R. pp. 60, 61). That would require a bracing (or leaning) back from the direction of movement. The shock of the stop "swung" respondent towards the front," etc.

2. Now it was respecting this very matter, which petitioner and its counsel now deem so vital, that all the "indications" and demonstrations, at considerable length, were placed before the trial court and jury (R. pp. 69, 70,

71, 86). These disclosed the whole matter, in detail, to the trial court and jury. Both found against petitioner's present claim.

3. It does not become petitioner now to complain that respondent did "not say what he means" by what he and petitioner's counsel said and "demonstrated" before the jury, in detail, nor, for the same reason, is it permissible for petitioner to substitute here what it now **says here** in explanation of what its counsel **showed to the trial court and jury on the trial. What was shown then is not here now.**

V.

Another Assumption.

Petitioner declares that the "law of inertia" (Pet. and Brief, p. 25) could not have been affected except by "unintention" or "as a result of some natural force." It then launches itself upon an effort to exclude all other "natural laws."

Here again petitioner ignores the fact that respondent is a living man and not an inanimate object; that the instinct of self-preservation is the most universal instinct and that peril instantly sets it in motion and that the jury, according to this Court, had the right to find that respondent was moved by it and immediately sprang to defense of life and limb with all the strength and power he possessed, and that the record does not contain the **demonstrations of the details of the actual event just as it happened.**

VI.

Petitioner's Decisions on Physical Law.

1.

Petitioner cites decisions applying on rule as to physical laws. Dunn v. Alton R. Co., 340 Mo. 1037, and Daniel v. K. C. Elec. Co., 177 Mo. App. 280, were the ones cited in the

Missouri Supreme Court. They are well disposed of in the opinion of that Court (R. p. 175). In Dunn v. Alton it will be noted that Dunn's testimony told everything, got everything wrong, excluded, in fact, any effort to save himself by grasping the various things about him, in front, behind and on each side of him, was not on a slippery-topped freight car, but in the vestibuled passageway between passenger cars. He, too, was an experienced railroader.

2.

The case in 177 Mo. App. 280 adds nothing, as the Missouri court held in this case.

3.

The next case petitioner cites on this matter is Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215 (Kansas City Ct. of App., Johnson, J.). It is enough to say that on the essential point the facts of that case are quite unlike the facts of this Pashea case—and none of the vital facts were omitted from the appellate record there and nothing in plaintiff's evidence there left anything whatever in doubt on the point.

4.

Rome Ry. & Light Co. v. Keel, 3 Ga. Appeals 769. This case distinguishes itself. The case was up from a ruling against defendant **on a demurrer to the petition.** There was no evidence for consideration, no modifying circumstances, not a hint of conditions like those in this case, nothing showing, by demonstrations, just what happened and how it happened, as in this case. Neither did the Court discuss the **change in the rate of diminution of speed, to which one riding a train is adjusted, when the brakes are released.** The effect of a sudden change in **the rate of diminution of speed** finds the car riders not ready for an instantaneous restoration of a nondiminishing speed.

5.

It is to be noted that the Missouri Supreme Court **in this case** and in Dunn v. Alton, 340 Mo. 1037, 104 S. W. (2d), l. c. 314 (1, 2), **held** that the first impulse upon a sudden stop would be **toward the engine,** and that a **releasing of the brakes would throw the car rider away from the engine.** Petitioner takes no heed of this. Of course, this case has many more things in the evidence (in the record **and not in the record**) than any case cited by petitioner.

6.

The other decision petitioner now cites is so unlike the case at bar in its facts that comment is unnecessary.

VII.

Opinion Not Based on Speculation.

1.

Paragraph III (of petitioner's brief, p. 35) contains no new matter and requires no additional comment.

2.

"Speculation."

The "Argument" in paragraph IV of petitioner's brief (pp. 35 et seq.) is of the same character. In that paragraph petitioner reasserts its claim that the Missouri Supreme Court's opinion (R. pp. 172 to 180), and on rehearing (R. pp. 230, 231) is "based wholly upon speculation and conjecture."

3.

Previous pages of this brief and argument disprove the soundness of this assertion both as a matter of fact and as a matter of law. The Missouri Supreme Court's opinion does both of the same things. This part of petitioner's

"Argument" does disclose that petitioner still relies upon the method of selecting mere fragments of respondent's testimony and ignoring all the rest and all the other evidence in the case, ignoring the vital "demonstrations" in evidence but not in the record, and also treating the physical law rule as if it made out petitioner's defense, if some possible factual theory could be worked out, from parts of the record thus emasculated, which tended to point in a direction favorable to petitioner.

On this matter also petitioner's brief and argument disclose that it is not able to bring itself to concede that it was and is under the necessity of proving, **beyond a doubt, that respondent's evidence was utterly incredible, and that it was wholly impossible that respondent could have fallen from the end of the car as a result of what happened because of the sudden and violent stop—of which sudden and violent stop there was ample evidence, as petitioner now seems to concede in this court.**

4.

Petitioner, on page 43 of its brief and argument, cites decisions. The opinion of the Missouri Supreme Court in this case (R. p. 179) takes up these decisions and refers to Hardin v. I. C. R. Co., 334 Mo. 1169, 70 S. W. (2d) 1075 (certiorari denied 293 U. S. 574), in which all but one were fully considered and petitioner's present contention denied. The additional decision cited by petitioner (283 U. S. 209, 215, et seq., on p. 43 of its brief) has no application here.

VIII.

Steele v. Railroad, 265 Mo. 97.

Petitioner, in its brief (p. 36), cites Steele v. Railroad, 265 Mo. 97, 117. That decision is illustrative of the other citations made in the same connection. The applicability of the Steele case was denied (R. p. 230) in the Missouri

Court's opinion on rehearing in this case. It is obvious it cannot apply. In the Steele case the only testimony on the issue as to liability was that of plaintiff. His testimony was utterly destructive of his case. Later recalled, he simply gave diametrically contradictory testimony on the point. He made no explanation whatever of this change. There was no other testimony on the point and no proof of any facts or circumstances tending to show liability. The Steele case rests upon that fact. It does not resemble this Pashea case.

IX.

Conclusion.

1.

In Van Brock v. Bank, 161 S. W. (2d) (Mo. Sup. Ct.) 258, l. c. 260, 261, the opinion quotes and approves a quotation from Mr. Thayer as follows:

> " 'It is the office of jurors to adjudge upon their evidence'; so the Court is reported to have said in Littleton's case. That remark brings out a fundamental point, so obvious as hardly to need stating, namely, that it is no test of a question of fact that it should be ascertainable without reasoning and the use of the 'adjudging' faculty; much must be conceived of as fact which is invisible to the senses, and ascertainable only in this way. Of course, by the judges this function of reasoning has constantly been exercised; the sentence just quoted makes it apparent that it must also be discharged by juries. We are not then to suppose that a jury has found all the facts merely because it has found all that is needed for the operation of the reasoning faculty; the right inference or conclusion, in point of fact, is itself a matter of fact, and to be ascertained by the jury. As regards reasoning, the judges have no exclusive office; the jury also must perform it at every step."

(1) In the performance in this case of this identical duty the trial jury of twelve men found against petitioner and the trial judge overruled petitioner's demurrer to the evidence and overruled its motion for new trial.

(2) Petitioner now asks this Court, in the performance of the same function, to hold, on a record **obviously containing only part of the evidence, that the whole of the evidence before the trial jury and trial court was, beyond a reasonable doubt, utterly incredible and impossible of belief.**

2.

An annotation, which includes the examination of a multitude of decisions, appears in 21 A. L. R. 141, pp. 145, 146, and summarizes the "laws of nature" rule as follows:

> "Courts will reject evidence which is clearly contrary to well known and undisputed laws of physics and mechanics, but generally are cautious in applying the rule—**at least where the testimony does not contravene such laws beyond any reasonable doubt.** And it may properly be conceded that under some circumstances the right to reject evidence is proper, as where it is contrary to nature's undisputable laws. **It must be borne in mind, however, in the first place, that there is no presumption that judges are any better informed than the members of juries as to the working of the laws of nature.** But admitting the superior capacity of the courts to deal with scientific principles in the abstract, they might well hesitate, as they often have, to reject on the ground that it is contrary to scientific principles, the testimony of witnesses, especially if disinterested, purporting to state an actual fact, **for the reason that there may have been some fact or circumstance not apparent that, if shown, would have reconciled the testimony of the witness with the scientific principles applicable to the subject.** To throw out the testimony of witnesses involves,

first, the correctness of the court's understanding of the scientific principles applicable to the question involved; **and, second, the assumption that all the facts which could affect the question are before the court.** Ordinarily, of course, the courts are entitled to base their decisions upon the showing made, but if the court undertakes to go outside and test the evidence by scientific principles, it would seem that it cannot properly close its eyes to the possibility that there may have been a fact or circumstance, not **disclosed,** which would reconcile the testimony of the witness with scientific principles—at least, unless the facts and circumstances **as shown** are such as reasonably to repel the existence of any other fact or circumstance which could affect the matter."

(In a jury case the jury are to determine "reasonability." The word "reasonably" should be "conclusively" in order to apply at this late day.)

The absence of "other facts and circumstance" is not merely inferable, generally, in this case. The record here affirmatively shows **the actual absence from the record of evidence affirmatively shown to have been before the jury and trial court,** as heretofore pointed out several times.

Respondent respectfully prays that the petition for certiorari be denied.

JAMES T. BLAIR,
HARVEY B. COX,
EDWARD KOOREMAN,
Attorneys for John G. Pashea, Respondent.